

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 21, 2006 Session

**KAREN WEBB v. TENNESSEE DEPARTMENT OF TOURIST
DEVELOPMENT ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 04-752-II Carol McCoy, Chancellor**

No. M2004-02763-COA-R3-CV - Filed on August 10, 2006

This appeal involves a state employee in the career service who lost her job in a reduction in force. After her former department created a new position in the executive service that she believed was similar to her former position, the employee filed a grievance asserting that she was entitled to be placed in the new position by virtue of Tenn. Code Ann. § 8-30-320(b) (Supp. 2005). Both the commissioner of the employee's former department and the Commissioner of Personnel determined that her complaint was not grievable. Thereafter, the employee filed a petition for judicial review under Tenn. Code Ann. § 4-5-322 (2005) in the Chancery Court for Davidson County. The state defendants moved to dismiss the petition for lack of subject matter jurisdiction on the ground that the employee was not appealing from a final decision in a contested case proceeding. The trial court granted the motion, and the employee has appealed. We have determined that the trial court erred by concluding that it lacked subject matter jurisdiction to hear the employee's petition. However, we have also determined that the employee's petition fails to state a claim upon which relief can be granted because Tenn. Code Ann. § 8-30-320(b) does not require the State to place laid-off employees in the career service into newly created positions in the executive service.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

David B. Lyons, Nashville, Tennessee, for the appellant, Karen Webb.

Paul G. Summers, Attorney General and Reporter, and Eugenie B. Whitesell, Senior Counsel, for the appellees, Tennessee Department of Tourist Development, Susan Whitaker, Tennessee Civil Service Commission, and Randy Camp.

OPINION

I.

Karen Webb has worked for the State of Tennessee for more than twenty years. In July 1992, she became the Tour and Travel Sales Manager for the Tennessee Department of Tourist Development. This position was in the career service.¹ On April 14, 2003, three months following the inauguration of a new governor, the new Commissioner of Tourist Development hand delivered a letter to Ms. Webb informing her that her position was going to be abolished as part of a reduction in force “due to the abolishment of positions and changes in the organizational structure of the Department of Tourist Development.”

Even though her position would not be abolished for at least ninety days, Ms. Webb was immediately placed on administrative leave and was instructed not to return to work. She was also encouraged to explore other job opportunities and was offered outplacement assistance. Ms. Webb’s search for another comparable job progressed slowly, and on July 1, 2003, the Commissioner of Tourist Development informed her that her last day of service with the department would be July 14, 2003. Ms. Webb eventually accepted a manager’s job at the Tennessee Department of Transportation, Division of Aeronautics even though the salary was lower than that of her previous job.

In September 2003, Ms. Webb obtained a copy of the Department of Tourist Development’s 2003-2004 marketing plan. She noticed with great interest that the Department had created a new Director of Sales position since her departure. The Director of Sales position was in the executive service rather than the classified service.² The information in the marketing plan led Ms. Webb to conclude that this new position had essentially the same duties as her abolished position.

On October 2, 2003, Ms. Webb filed a grievance with the Commissioner of Tourist Development in which she stated her belief that the Department had “incorporated” the duties of her abolished Tour and Travel Manager position into the newly created Director of Sales position. She requested that she be placed in the Director of Sales position or a comparable position and that she be reimbursed for “all lost wages and expenses incurred for my dependent daughter and me to be covered by insurance at the loss of State coverage.” Ms. Webb also retained a Nashville attorney who suggested to the Commissioner of Tourist Development that failing to place Ms. Webb in the Director of Sales position would be a violation on Tenn. Code Ann. § 8-30-320.

¹The career service includes all offices and positions of trust and employment in the state service which have been placed under civil service. Tenn. Code Ann. § 8-30-101(a)(3) (Supp. 2005).

²Unless otherwise excluded by statute, the executive service consists of all other positions in the state service that have not been placed under the classified [career] service. Among the positions explicitly placed in the executive service are “[a]ny division director or equivalent with statewide responsibility in each department or agency.” Tenn. Code Ann. § 8-30-208(b)(4) (2002). The Commissioner of Personnel has the authority to assign positions to the career or executive service. Tenn. Code Ann. § 8-30-208(d).

On November 10, 2003, the Commissioner of Tourist Development responded that “the newly created position of Director of Sales does not have the same or essentially similar duties as the position you occupied.” She advised Ms. Webb that the new position answered directly to an assistant commissioner, had considerably more duties,³ and had a higher “level of responsibility” than Ms. Webb’s former position. Accordingly, the Commissioner of Tourist Development informed Ms. Webb that “it has been determined that this is a non-grievable matter.”⁴

On January 7, 2004, Ms. Webb, through her lawyer, appealed the Commissioner of Tourist Development’s decision to the Civil Service Commission. Her lawyer again insisted that Tenn. Code Ann. § 8-30-320(b) gave Ms. Webb the right to be placed in the Director of Sales position. In accordance with Level V of the grievance procedures, Ms. Webb’s lawyer also requested that a contested case proceeding under the Uniform Administrative Procedures Act be convened to address Ms. Webb’s grievance. On January 14, 2004, the Commissioner of Personnel, acting as the secretary to the Civil Service Commission,⁵ informed Ms. Webb that she had raised a non-grievable matter and, therefore, that the “Civil Service Commission has no authority to hear your appeal.”

Ms. Webb’s next course of action was to petition the Chancery Court for Davidson County for judicial review in accordance with Tenn. Code Ann. § 4-5-322 (2005). She asserted that the state defendants⁶ had wrongfully classified the Director of Sales position as an executive service position, had wrongfully refused to place her in that position as required by Tenn. Code Ann. § 8-30-320(b), and had wrongfully refused to grant her a hearing before the Civil Service Commission. The state defendants filed a Tenn. R. Civ. P. 12.02(1) motion to dismiss Ms. Webb’s petition for lack of subject matter jurisdiction because Ms. Webb had never been afforded a contested case hearing and because she had failed to seek a declaratory order from the Commissioner of Personnel as required by Tenn. Code Ann. § 4-5-223 (2005). In her response to the state defendants’ motion, Ms. Webb alternatively sought declaratory relief in accordance with Tenn. Code Ann. § 4-5-225 (2005).

The trial court granted the state defendants’ motion to dismiss. It agreed that Ms. Webb’s complaint was non-grievable and, therefore, that it had no jurisdiction to grant her relief under Tenn. Code Ann. § 4-5-322 because a contested case hearing was never held to dispose of her grievance. The trial court also concluded that Ms. Webb was not entitled to declaratory relief under Tenn. Code Ann. § 4-5-225 because she had not first petitioned the Commissioner of Personnel for a declaratory order as required by Tenn. Code Ann. § 4-5-223. Ms. Webb has appealed.

³The Commissioner stated that “[l]ess than 15% of the duties performed by the Sales Director are related to duties of your previous position.”

⁴The Commissioner’s use of the passive voice makes it impossible to determine who actually determined that Ms. Webb’s invocation of her rights under Tenn. Code Ann. § 8-30-320(b) was a non-grievable matter.

⁵Tenn. Code Ann. § 8-30-202(a)(1) (2002).

⁶Ms. Webb names as defendants the Department of Tourist Development, the Tennessee Civil Service Commission, the Commissioner of Tourist Development, and the Commissioner of Personnel.

II.

The primary focus of this appeal is on the trial court's subject matter jurisdiction to consider Ms. Webb's petition for judicial review. The concept of subject matter jurisdiction involves the powers of a court to adjudicate a particular type of case or controversy. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004); *Toms v. Toms*, 98 S.W.3d 140, 143 (Tenn. 2003). A court derives its subject matter jurisdiction, either explicitly or by necessary implication, from the Tennessee Constitution or from legislative acts. *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 639 (Tenn.1996); *Dishmon v. Shelby State Cmty. Coll.*, 15 S.W.3d 477, 480 (Tenn. Ct. App.1999).

The existence of subject matter jurisdiction depends on the nature of the cause of action and the relief sought. *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). Thus, when a court's subject matter jurisdiction is questioned, it must first ascertain the nature or gravamen of the case. Then the court must determine whether the Tennessee Constitution, the General Assembly, or the common law have conferred on it the power to adjudicate cases of that sort. *Staats v. McKinnon*, No. M2005-01631-COA-R9-CV, 2006 WL 1168826, at *5 (Tenn. Ct. App. May 5, 2006), *perm app. filed* (Tenn. June 30, 2006). Both of these determinations present questions which this court reviews de novo without a presumption of correctness. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *Southwest Williamson County Cmty. Ass'n v. Saltsman*, 66 S.W.3d 872, 876 (Tenn. Ct. App. 2001).

Two methods are available to challenge a court's subject matter jurisdiction. The first, and most common, is a "facial" challenge; the second is a "factual" challenge. *Thomas v. Mayfield*, No. M2000-02533-COA-R3-CV, 2004 WL 904080, at *4-5 (Tenn. Ct. App. Apr. 27, 2004), *perm. app. denied* (Tenn. Nov. 15, 2004); 2 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 12.30[4] (3d ed. 2005). A facial challenge to a court's subject matter jurisdiction, like the challenge in this case, makes war on the complaint itself. Therefore, the process used to consider a "facial" challenge to a court's subject matter jurisdiction resembles the method for deciding motions to dismiss for failure to state a claim upon which relief can be granted. Thus, in deciding the facial challenge, the court considers only the impugned pleading and nothing else. If the complaint being attacked competently alleges any facts which, if true, would establish grounds for subject matter jurisdiction, the court must uncritically accept those facts and deny the dismissal of the motion. *Staats v. McKinnon*, 2006 WL 1168826, at *5. In this case, the state defendants have made a facial challenge to the trial court's subject matter jurisdiction to consider Ms. Webb's petition.

III.

Ms. Webb vigorously asserts that fundamental fairness dictates that the courts should consider the substance of her claim. She argues that she was not required to seek a declaratory order from the Commissioner of Personnel in accordance with Tenn. Code Ann. § 4-5-223 because her complaint was a grievable matter. The state defendants continue to insist that Tenn. Code Ann. § 4-5-225 provides the only avenue for persons like Ms. Webb to obtain judicial review and that Ms. Webb was not entitled to a declaratory judgment regarding the application of Tenn. Code Ann. § 8-30-320(b) because she had failed to seek a declaratory order under Tenn. Code Ann. § 4-5-223. We

have determined that the papers Ms. Webb filed with both the Department of Tourist Development and the Department of Personnel raise grievable matters, at least in part. Therefore, the trial court erred by dismissing Ms. Webb's petition on the ground that it lacked subject matter jurisdiction.

Career employees have the right to pursue "bona fide complaints or grievances" in the workplace. Tenn. Code Ann. § 8-30-328(a)(4) (2002). Accordingly, the Department of Personnel has promulgated rules establishing a five-step grievance procedure. Tenn. Comp. R. & Regs. 1120-11-.01 through 1120-11-.09 (2000). Among other things, these rules define the personnel actions that are considered grievable, Tenn. Comp. R. & Regs. 1120-11-.07, and those that are considered non-grievable. Tenn. Comp. R. & Regs. 1120-11-.08.

When a career employee pursues a complaint regarding a grievable matter, the employee is entitled to consideration of his or her grievance by the appointing authority and ultimately to a hearing before the Civil Service Commission if he or she is dissatisfied with the appointing authority's decision. Tenn. Code Ann. § 8-30-328(b), (d). Employees who are dissatisfied with the outcome of the administrative consideration of their grievance are entitled to judicial review in accordance with Tenn. Code Ann. § 4-5-322.

If, however, a career employee desires to pursue a non-grievable claim, he or she is not entitled to insist on the five-step grievance process culminating in a contested case hearing before the Civil Service Commission. Employees desiring to raise a non-grievable claim must seek a declaratory order either from their appointing authority or from the Commissioner of Personnel in accordance with Tenn. Code Ann. § 4-5-223. If the appointing authority or Commissioner of Personnel declines to provide the employee with a declaratory order, then the employee may file a petition for declaratory judgment under Tenn. Code Ann. § 4-5-225.⁷

The pivotal issue in this case is whether Ms. Webb's complaint involves a matter that is grievable or non-grievable. The state defendants insist Ms. Webb's complaint is non-grievable based on Tenn. Comp. R. & Regs. 1120-11-.08(8) which states that "[a]ctions resulting from reductions in force when an approved reduction in force plan was followed" are non-grievable. However, this argument overlooks Tenn. Comp. R. & Regs. 1120-11-.07(4) which explicitly states that "[n]on-compliance with an approved reduction in force plan by an appointing authority" is grievable. Thus, we must decide whether Ms. Webb asserted a grievable matter when she alleged that the Commissioner of Tourist Development failed to comply with its reduction in force plan when it failed to offer her the newly created Director of Sales position.

The departments and agencies in the Executive Branch of state government are authorized by statute to devise and implement reduction in force plans whenever necessary "by reason of shortage of work or funds, or the abolition of a position or other material change in duties or organization." Tenn. Code Ann. § 8-30-320(a)(1)(A). These reduction in force plans must be

⁷ If the department or agency decides to consider the employee's request for a declaratory order, it must convene a contested case hearing. Tenn. Code Ann. § 4-5-223(a)(1). Judicial review of the results of this contested case hearing would be in accordance with Tenn. Code Ann. § 4-5-322.

approved by the Commissioner of Personnel. Tenn. Comp. R. & Regs. 1120-2-.14(1) (2002). In order to be approved, they must be consistent with applicable statutes and rules, and thus they must incorporate the transfer, bumping, retreating, and re-employment rights afforded to career service employees by statute or rule.

Career service employees who are affected by a reduction in force have transfer, bumping, retreating, and re-employment rights. The State must assist these employees by attempting to place them in comparable jobs for which they are qualified. Tenn. Code Ann. § 8-30-320(b). In addition, the names of employees affected by a reduction in force must be placed on a “layoff list” maintained by the Department of Personnel. The employees on the layoff list “shall have a priority right to transfer, promotion, or reappointment to the location or job classification held prior to any reduction in force.” Tenn. Code Ann. § 8-30-322(a)(1) (2002). No vacant career service position may be filled until the Department of Personnel determines that no employee on the layoff list is qualified for and desires the position. Tenn. Code Ann. § 8-30-322(a)(2). Laid off career service employees retain these rights for two years. Tenn. Code Ann. § 8-30-322(b)(3).

In 1986, the Tennessee General Assembly addressed the traditional practice of using a reduction in force as a pretext for removing and replacing undesirable employees by abolishing their positions and then re-establishing essentially the same positions to be filled with more acceptable employees. It enacted Tenn. Code Ann. § 8-30-320(b)⁸ which provides:

A position in the career service shall not be considered to have been abolished as provided in subsection (a) if the same or essentially similar duties are incorporated in a new position in the same agency within two (2) years of the date a career service employee is required to transfer, bump, retreat, or is placed in layoff status because of the position abolishment. Any career service employee so affected by such position abolishment shall be offered the newly established position without further competition.

From and after July 1, 1986, any reduction in force plan implicitly incorporates the rights afforded career service employees by Tenn. Code Ann. § 8-30-320(b). Thus, any career service employee affected by a reduction in force plan must be offered any newly created career service position in their former department if the new position has the same or essentially similar duties and if the new position is created within two years after the employee was laid off or was required to transfer, bump, or retreat to another position.

Tenn. Code Ann. § 8-30-320(b) was an integral part of the Department of Tourist Development’s 2003 reduction in force plan. Therefore, if Tenn. Code Ann. § 8-30-320(b) applies to the Director of Sales position, Ms. Webb has asserted a matter that is clearly grievable under Tenn. Comp. R. & Regs. 1120-11-.07(4) because she is alleging that the Department of Tourist

⁸ Act of Apr. 16, 1986, ch. 869, 1986 Tenn. Pub. Acts 955, *amended by* Act of Apr. 16, 1992, ch. 792, 1992 Tenn. Pub. Acts 405.

Development failed to comply with its own reduction in force plan. If the matter was grievable, Ms. Webb had a right to a contested case hearing before the Civil Service Commission to determine whether Tenn. Code Ann. § 8-30-320(b) applied to her claim that she should have been offered the Director of Sales position. The fact that the Civil Service Commission did not afford her a hearing does not prevent her from seeking judicial review under Tenn. Code Ann. § 4-5-322. *See Morris v. Correctional Enters. of Tenn.*, No. 01A01-9612-CH-00543, 1997 WL 671988, at *4 (Tenn. Ct. App. Oct. 29, 1997) (No Tenn. R. App. P. 11 application filed); *Armstrong v. Tenn. Dep't of Veterans Affairs*, 959 S.W.2d 595, 600 (Tenn. Ct. App. 1997) (both cases holding that a state employee had a right to judicial review under Tenn. Code Ann. § 4-5-322 regarding the Civil Service Commission's erroneous refusal to conduct a contested case hearing).

Ms. Webb's petition for judicial review alleges that she was entitled to file a grievance regarding the Department of Tourist Development's failure to offer her the newly created Director of Sales position. She asserts that Tenn. Code Ann. § 8-30-320(b) gave her a right to this position and that by failing to offer her the position, the Department of Tourist Development ignored the requirements of state law embodied in the reduction in force plan. These assertions, on their face, raise a grievable matter under Tenn. Comp. R. & Regs. 1120-11-.07(4). Therefore, the trial court erred by concluding that it lacked subject matter jurisdiction to adjudicate Ms. Webb's petition.⁹

IV.

Ordinarily, our conclusion that a trial court erred by concluding that it lacked subject matter jurisdiction over a matter would result in a remand with directions to adjudicate the dispute. We have determined, however, that a remand is unnecessary in this case because the trial court reached the correct result when it dismissed Ms. Webb's petition. Rather than dismissing Ms. Webb's petition for lack of subject matter jurisdiction, the trial court should have dismissed it for failure to state a claim upon which relief can be granted.¹⁰

Ms. Webb's argument that Tenn. Code Ann. § 8-30-320(b) entitles her to the Director of Sales position overlooks the fundamental difference between career service positions and executive service positions. The two-fold purpose for this distinction is to protect career state employees from unwarranted interference with the jobs while at the same time giving the governor and other cabinet level officials the flexibility needed to recruit qualified persons to fill policy-making and political

⁹We also note that the trial court made another misstep by holding that Ms. Webb was not entitled to invoke Tenn. Code Ann. § 4-5-225 as a basis for its subject matter jurisdiction to consider her petition because Ms. Webb had not first requested the Department of Personnel for a declaratory order. While not specifically invoking Tenn. Code Ann. § 4-5-223, Ms. Webb's January 7, 2004 letter requested that Tenn. Code Ann. § 8-30-320(b) be construed to apply to her request for the newly created Director of Sales position. The Commissioner of Personnel's January 14, 2004 letter declining to conduct a contested case hearing on the ground that Ms. Webb had failed to assert a grievable matter was tantamount to a denial of a request for a declaratory order for the purpose of Tenn. Code Ann. § 4-5-225(b).

¹⁰The Court of Appeals may affirm a judgment on different grounds than those relied on by the trial court when the trial court reached the correct result. *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999); *Allen v. National Bank of Newport*, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992); *Clark v. Metropolitan Gov't*, 827 S.W.2d 312, 317 (Tenn. Ct. App. 1991).

positions. Accordingly, state law affords career service employees far more job protections than it affords to executive service employees.

Tenn. Code Ann. § 8-30-320(b) requires that a career service employee be offered a newly created position “without further competition.” This phrase is significant because only career service positions are filled through a competitive process. Executive service positions are filled by appointment without the constraints of competition. Because Tenn. Code Ann. § 8-30-320(b) simply dispenses with competition for a newly created position, no conclusion can be drawn other than that Tenn. Code Ann. § 8-30-320(b), by its own terms, applies only to career service positions.

There is no dispute that the Director of Sales position in the Department of Tourist Development is a position in the executive service. The Commissioner of Personnel has the authority to classify all positions in the state service and, in the absence of statutory direction, to determine whether the position should be assigned to the career service or the executive service. Tenn. Code Ann. § 8-30-208(d). Since these decisions are non-grievable, Tenn. Comp. R. & Regs. 1120-11-.08(12); *Morris v. Correctional Enters. of Tenn.*, 1997 WL 671988, at *5, the classification of the Director of Sales position as an executive service position is beyond the reach of this appeal.

Even if we presume that all the allegations in Ms. Webb’s petition for judicial review are true, she has failed to state a claim for relief under Tenn. Code Ann. § 8-30-320(b) because the position she seeks, the Director of Sales in the Department of Tourist Development, is in the executive service, not the classified service. Therefore, her petition should have been dismissed on Tenn. R. Civ. P. 12.02(6) rather than Tenn. R. Civ. P. 12.02(1) grounds.

V.

We affirm the dismissal of Ms. Webb’s petition for judicial review and remand the case to the trial court for whatever further proceedings may be required. We tax the costs of this appeal to Karen Webb and her surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.